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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES AND THE NATIONAL
AERONAUTICS AND SPACE ADMINISTRATION,

Appellants,

vs.

PHYSICS TECHNOLOGY LABORATORIES,
INC., et al.,

Appellees.

REPLY BRIEF FOR APPELLANTS

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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REPLY BRIEF FOR APPELLANTS

SUMMARY OF ARGUMENT
IN REPLY TO APPELLEES' BRIEF

The arguments and authorities set forth in appellees' Brief do not refute the Government's position that if an action may be maintained against it arising out of the facts alleged in the Amended Complaint, such action may not be based upon the Federal Tort Claims Act, but may be maintained only under the Tucker Act either (1) for the breach of an express or implied contract or agreement between appellees and NASA, or (2) as a claim "founded either upon . . . any Act of Congress, or any regulation of an executive department". 28 U.S.C. 1491.

As to (1) above, the Government has not "seized" upon the

specific language of the Amended Complaint in challenging the jurisdiction of the District Court, as contended by appellees. Nor does the Government construe appellees' claim as being based upon a formal written contract between them and NASA. Instead, the Government's position follows from the conclusion that there can be no liability in the present case unless appellees can prove, first, a promise by NASA, either express or implied, not to disclose appellees so-called "Space Propulsion Concept" to persons outside the Government, and secondly, a wrongful breach of that promise. As stated in the annotation quoted in the Government's Brief (p. 11), in cases where a party claims that a trade secret disclosed "in confidence" was later disclosed to others in breach of the confidence, "the basis of relief is actual or threatened breach of the obligation of an implied contract. . .". 170 A. L. R. 449, 475 (1947). Appellees' action, therefore, is essentially for the breach of an express or implied agreement or contract, and as such, may be founded only upon the Tucker Act.

As to (2) above, appellees contend that employees of NASA negligently disclosed appellees' so-called "Space Propulsion Concept" in violation of the provisions of 18 U. S. C. 1905 and in violation of NASA regulations. ^{1/} This adds support to the Government's position on jurisdiction. Under 28 U. S. C. 1346(a)(2) and 28 U. S. C.

^{1/} Appellees refer to the Armed Services Procurement Regulations, which apply only to the Department of Defense. The NASA Procurement Regulations appear at 41 C. F. R. 18-1.100 et seq. For the purpose of this Appeal, the differences between the two are not pertinent.

1491 claims in excess of \$10,000 founded on Federal statute or regulation, as well as those founded on express or implied contract with the United States, are not included within the jurisdiction of the district courts but are placed within the exclusive jurisdiction of the Court of Claims under the Tucker Act.

Appellees cite no case in which an action for the unauthorized disclosure of a trade secret was successfully maintained under the Federal Tort Claims Act. Indeed, all the cases in point, including Fulmer v. United States, 83 F. Supp. 137 (N. D. Ala. 1949), Aktiebolaget Bofors v. United States, 93 F. Supp. 131 (D. D. C. 1950), aff'd 194 F.2d 145 (D. C. Cir. 1951), Padbloc Co. v. United States, 161 Ct. Cl. 369, 137 U.S.P.Q. 224 (Ct. Cl. 1963), and Woodbury v. United States, 313 F.2d 291 (9th Cir. 1963), all cited and discussed in the Government's Brief, support the Government's position that the District Court erred in refusing to grant the Government's Motion to Dismiss or alternatively to transfer the case to the Court of Claims under 28 U.S.C. 1406(c).

CONCLUSION

It is respectfully requested that the District Court Order denying the Government's Motion to Dismiss be reversed and that the case be remanded with instructions to dismiss appellees' Amended Complaint. Alternatively, it is requested that the case be remanded to the District Court with instructions to transfer the case to the Court of Claims under 28 U. S. C. 1406(c).

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this reply brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief is in full compliance with those rules.

/s/ Clarke A. Knicely
CLARKE A. KNICELY

